

The UK Bribery Act: Are you safe in the UAE?

Andrew Hudson
a.hudson@tamimi.com

November 2014

Introduction

Bribery is bad for legitimate business, tarnishing the names of companies that are known to be associated with it. Such reputational damage is an additional consideration to the legal consequences of permitting or failing to prevent corrupt practices, whether corporately or by rogue representatives acting against the company's policies and procedures. Bribery also creates problems for governments that are trying to tackle corruption and to encourage foreign investment, as a level playing field is obviously desirable for the honest majority.

In addition to international legal provisions to combat corruption (for example, the United Nations Convention Against Corruption) that lead to domestic anti-bribery legislation, the international business community also recognises the need to do away with corruption, as opposed to well-intended and legitimate marketing practices. This has resulted in, for example, the recent publication by the International Chamber of Commerce ("ICC"), in June 2014, of Guidelines on Gifts and Hospitality, which make reference to various international legislative provisions.

The United Arab Emirates ("UAE"), along with most of the international community, is keen to minimise instances of bribery, to bring perpetrators to justice and to deter others from employing corrupt methods of doing business.

This article sets out brief summaries of the UAE and UK anti-bribery provisions and then underscores the importance, to persons and businesses in the UAE, of conducting themselves in compliance with the UK Bribery Act 2010 ("UKBA") in addition to the relevant UAE anti-bribery provisions.

UAE Anti-Bribery Provisions

A detailed analysis of the UAE anti-bribery provisions is beyond the scope of this article. In brief, however, bribery is primarily criminalised and prohibited in the UAE by the UAE Federal Law no. 3 of 1987 as amended ("Penal Code").

The Penal Code specifically prohibits passive bribery (receiving or requesting a bribe) in both the public and private sectors and active bribery (giving or offering a bribe) in the public sector. However, active bribery in the private sector is not specifically prohibited. A person who gives or offers a bribe to a person in the private sector would need to be prosecuted as an accomplice to the recipient of the offer or bribe.

Summary of the United Kingdom Bribery Act

The UKBA came into force on 1 July 2011, replacing several legislative provisions that dealt with corruption and had been in place from as early as 1889. Offences under the UKBA are:

1. Bribing a person (active bribery) (s.1);
2. Being bribed (passive bribery) (s.2);

3. Bribing a foreign public official (s.6); and
4. Failing to prevent bribery by associated persons (applicable to commercial organisations) (s.7).

The first three offences are punishable by a maximum sentence of 10 years' imprisonment, an unlimited fine, or both. The offence of failure to prevent bribery is punishable by an unlimited fine.

Applicability of the UKBA outside the UK

Section 12 of the UKBA details the provisions of the act that relate to territorial application. The UKBA expressly provides jurisdiction for criminal proceedings to be taken in the UK for the four offences listed above, although there is a distinction between the first three ('personal') offences and the fourth ('corporate') offence in this regard.

In respect of the first three offences, the effect of s.12 of the UKBA is that the offence is deemed to have taken place in the UK (and to therefore be subject to UK jurisdiction) if:

1. any act or omission which forms part of the offence took place in the UK; or
2. a person acts or omits to act outside the UK in a way that would form part of an offence if performed in the UK and that person has a close connection to the UK.

An exhaustive list of ways in which a person may have a close connection to the UK is set out in s.12(4). The person must have been, at the time of the act or omission, one of the following:

1. a British citizen,
2. a British overseas territories citizen,
3. a British National (Overseas),
4. a British Overseas citizen,
5. a person who under the British Nationality Act 1981 was a British subject,
6. a British protected person within the meaning of that Act,
7. an individual ordinarily resident in the UK,
8. a body incorporated under the law of any part of the UK,
9. a Scottish partnership.

In respect of the fourth offence listed above (failure by a corporate body to prevent bribery), s.12(5) states that it does not matter whether the acts or omissions which form part of the offence took place in the UK or elsewhere. The company is subject to the UKBA if it is incorporated in the UK or, if not, if it carries on business in the UK. For the company to be guilty of failing to prevent bribery committed by a person, that person must have committed (i) bribery of a person or (ii) bribery of a foreign public official (but need not be actually prosecuted for either offence). In either case, the bribery may have taken place inside or outside the UK. Where it took place outside the UK, there is no need for the person committing bribery to have a close connection with the UK.

Guidance on the UK Bribery Act

Facilitation Payments

UAE businesses may be particularly interested in the area of facilitation payments. Unlike the FCPA (in certain circumstances), the UKBA does not permit facilitation payments, which are unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. They are sometimes referred to as 'speed' or 'grease' payments. The payer of the facilitation payment usually already has a legal or other entitlement to the relevant action.

In an open letter dated 6 December 2012, the Director of the Serious Fraud Office ("SFO") made it clear that the UK Government and the SFO are committed to stamping out bribery and upholding the rule of law, that facilitation payments are not permitted under the UKBA (and were not permitted under the previous

UK anti-bribery laws), and encouraged UK individuals or companies who are asked to make a facilitation payment in the course of business overseas to report such requests to the local embassy, high commission or consulate.

Hospitality and promotional expenditure

The joint prosecution guidance to the UKBA, published by the Director of the SFO and the Director of Public Prosecutions (“DPP”) in March 2011, makes it clear that hospitality or promotional expenditure which is reasonable, proportionate and made in good faith is an established and important part of doing business and the UKBA does not seek to penalise such activity.

In the right (or wrong) circumstances, however, hospitality and promotional expenditure could form the basis of the offences of bribing another person or bribing a foreign official and could be a bribe for the purposes of the failure to prevent bribery offence. Each case will depend on the facts, all of which will need to be considered by the prosecutor before making a decision to prosecute.

Failure of commercial organisations to prevent bribery - Defence of Adequate Procedures

A commercial organisation will have a defence to a charge under s.7 if it can show that it had adequate procedures in place to prevent persons associated with it from bribing. The standard of proof required is the balance of probabilities i.e. “is it more likely than not that the procedures were adequate?” This will be a matter for the courts to decide on a case by case basis and will be a factor to be considered by the prosecutor in deciding whether to prosecute. Prosecutors must also, when considering whether the procedures put in place are adequate, take into account the 43-page guidance document published by the Ministry of Justice on procedures that commercial organisations can put in place to prevent bribery by persons associated with them.

Examples related to the UAE

There are recent examples (July and October 2014) of investigations by the UK SFO into allegations of corrupt practices conducted in the UAE by employees or representatives of UK entities. These investigations are in relatively early stages and, although their outcome cannot be predicted, they serve as a reminder that commercial operations in the UAE will not escape the attention of the UK authorities when there is reason to investigate.

Conclusion

From a legal perspective, persons in the UAE could be liable to prosecution under the UKBA in the UK if they (i) have the required connection to the UK (for example, by being a UK citizen, a UK-incorporated company, a company carrying on business in the UK or if they travel to the UK and commit a relevant act while there) or (ii) if they engage in a conspiracy with a person who is in the UK, to commit bribery, even if they have no connection to the UK.

Of course, quite apart from the threat of prosecution under the UKBA is the distinct possibility of action by the UAE authorities under the anti-bribery provisions of the Penal Code (or other applicable legislation).

In the end, however, good business practice should be about making the right ethical decisions, not merely complying with the law for fear of prosecution. Compliance with the UKBA (and any other anti-corruption legislation) ought really to be taken by companies as an opportunity to focus on honing their due diligence to ensure the honest and profitable conduct of business, in an international market where high standards of anti-corruption practice are increasingly the desirable norm.